***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

To be argued by:
Arthur A. Chalenski, Jr.

**Docket No. 76-1436**

B Pls

In The

# United States Court of Appeals

For the Second Circuit

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*— against —*

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL,

*Defendants-Appellants.*

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On Appeal from The United States District Court
for the Northern District of New York

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## BRIEF FOR APPELLEE,
United States of America

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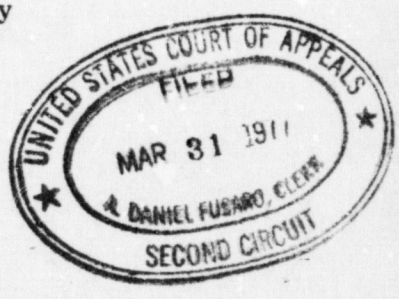
PAUL V. FRENCH
United States Attorney
Northern District of New York
ARTHUR A. CHALENSKI, JR.
Assistant United States Attorney
*Attorneys for Appellee.*



*Of Counsel:*
MARK VOGEL
*Attorney*
Department of Justice
Washington, D. C.



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In The

# United States Court of Appeals

For the Second Circuit

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

JERRY WINSTON,
BROOME COUNTY AVIATION, INC.,
COMMUNITY AIRLINES, INC., and
THEODORE (TED) BELL,

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**BRIEF FOR APPELLEE,**
**United States of America**

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## STATEMENT OF THE ISSUES

I. Whether the evidence was sufficient to sustain the jury verdict below.

II. Whether the trial court erred in instructing the jury that specific intent is a material element of the crime.

III. Whether threatening speech is protected by the First Amendment.

IV. Whether the use of speech as evidence of intent in the substantive counts violates the First Amendment.

V. Whether post-election retaliation constitutes interference with an employee's designation of a representative.

VI. Whether the factual question of whether the two defendant corporations in fact had employees can be raised for the first time on appeal.

VII. Whether the convictions on Counts 2, 3, 10 and 11 violate double jeopardy.

## STATEMENT OF THE CASE

On July 2, 1975, a seventeen count Indictment was filed with the United States District Court for the Northern District of New York, charging the defendants with violating Section 2 of the Railway Labor Act, 45 U.S.C. §152 (hereinafter referred to as the "Act") and conspiracy so to do in violation of 18 U.S.C. §371. In particular, the two corporations and Jerry Winston were charged with eight counts of violating paragraphs Third and Tenth of the Act, and with eight counts of violating paragraphs Fourth and Tenth of the Act. All four defendants were charged in Count I with conspiring to violate the Act. The Indictment charges acts commencing in August 1974 and continuing through July 2, 1975.

Trial of the case commenced on June 1, 1976 before the Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York, sitting by designation. On June 8, 1976, Counts IX and XVII of the Indictment, and the Ninth Overt Act of Count I, were dismissed on motion of the Government (686)*. On June 17, 1976, the jury found the defendants guilty on all remaining counts.

On September 16, 1976, Judge MacMahon sentenced Winston to 15 days imprisonment and a fine of $5,000 on each count, the prison sentences to run concurrently and the fines to be paid consecutively. The corporate defendants were each fined

* The number in parentheses refers, here and hereafter, to the pages of the Appendix. Pages 1a through 12a of the Appendix consist of the docket entries, the indictment and the judgments; 1 through 2160 of the trial transcript; 1e through 82e of the designated trial exhibits.

$1,000 on each count, to be paid consecutively, and Bell was given a six-month sentence of imprisonment, which was suspended, and he was placed on probation for three years.

## STATEMENT OF THE FACTS

The defendant Jerry Winston owns and is the chief administrative officer (1159) of a small aviation business headquartered in Binghamton, New York. The business consists of two corporations, Commuter Airlines, Inc., and Broome County Aviation, Inc., both owned by Winston (1385). Broome County Aviation provides fuel and maintenance services for aircraft at the airport, charter flight service to corporations and individuals, a flying school, and mail service under contract to the federal government (1386-7). Commuter Airlines, Inc. provides the scheduled flight service (1389). The defendant Theodore Bell is the company's chief pilot, responsible for the operational part of the flight department of the company (1004). Bell screened and hired pilots and could make recommendations to discharge, to Winston (1005-6). The business employed approximately two dozen pilots (Govt. Ex. 5), as well as mechanics and other non-flying staff.

In August, 1974, the captains (the pilot force was divided into "captains" and "co-pilots", hereinafter collectively referred to as "pilots") met at the home of Captain Michael Kleitz (380). The defendant Bell, Jon Harrington, and William Lamos, and at least four other captains were present (381). At that meeting, the captains discussed employee unrest about salaries and benefits, including the vacation plan and dispatch duties (381). Lamos was the secretary of the meeting and prepared a statement of bargaining demands (381).

Lamos gave the statement to the defendant Bell (382). Bell was supposed to present the statement to the defendant Winston (382), but Lamos testified he did not know whether Bell ever did or did not (382). The captains had another similar meeting about two weeks later (412-3).

On about September 24, 1974, co-pilot Robert Slough prepared a letter concerning his thinking on the course the employees should take toward representation and distributed it to the other pilots of the company ( ). Although Slough alone prepared the letter, on about September 26, 1974 he told Assistant Chief Pilot Jon Harrington that co-pilots Ira Josephson, DeLaurentis, and Leonard had helped him prepare the letter (124-8).

On about October 26, 1974, Slough contacted Alex Calder, a business representative for the Airline and Aero-Space Employees Union, Teamsters Local 732 (251-2). Calder suggested to Slough that they get all the pilots together and he would meet with them and explain the process of forming a union (99). Slough got the pilots together at a meeting at the Holiday Inn on October 2, 1974, so that Calder could address them (99). Most of the pilots were in attendance at the meeting, including Assistant Chief Pilot Jon Harrington, but not including either of the defendants, Winston or Bell (100). Robert Slough and co-pilot Ira Josephson stood at the doorway with Alexander Calder, directing the pilots to the room for the meeting and introducing the pilots to Calder (100). Calder addressed the

pilots at that meeting concerning unionization and specifically mentioned the names of Slough and Josephson. Calder said, during his address, that the union procedure had started the day Slough called him (107) and that Josephson would probably come under suspicion or discipline from the management (107). Slough testified that captain Michael Baan was the only pilot he recalled speaking up at the meeting and he recalled Baan stating that he had gone to another company that had a union, that it worked out quite well, and that they should have a union at Binghamton (108). The meeting ended at about 11:00 o'clock or 12:00 o'clock that evening (141, 253).

At the meeting of October 2, 1974, the employees signed sufficient authorization cards so that the Teamsters petitioned the National Mediation Board (NMB) for an election (265-6). (Govt. Ex. 3, App. 6e ).

The next morning, October 3, 1974, Slough, Josephson, and Baan were fired. The defendant Bell fired Slough and Baan (103, 243). Josephson was fired at about 10:30 A.M. by both Bell and Winston (186-7, 213). Bell discharged Slough at about 9:00 the next morning (151) and told Slough he was being fired for incompetency and a bad attitude (103). When firing Slough, Bell told Slough that it was his understanding that the letter circulated on October 24 had been prepared by other people, including Ira Josephson and co-pilot Delbert D. Delaurentis (98, 163). In fact, they had not written the letter and

Slough had told only Jon Harrington that they had (170). Josephson was told that his performance was poor (187). Baan, who had been hired three weeks previously (244), was told by Bell that he was fired because they didn't need his services and they didn't have the growth that the company had planned on (243-4).

On October 5, 1974, Winston and Bell gathered their pilots together to listen to speeches about unionization. They spoke first at a meeting of the captains (476), and later on the same day spoke at a meeting of the co-pilots (476, 312). A portion of the speeches to the co-pilots by Winston and Bell was recorded and played for the jury (444-474). During his remarks to each of the captains and the co-pilots, Bell said that two people are running, one is himself and the other is Jimmy Hoffa (473). During his speech to the captains, Bell reminded them that he had bent rules in the past when they were flying with him. Bell either used the term "check rides" [which the captains are required to pass every six months or be grounded (386)] or was, in any event, sufficiently specific that he left no question that he was referring to check rides (384-5, 751, 797-8, 1377-8).

Following the meeting of October 5, 1974, the National Mediation Board found that a dispute existed (Govt. Ex. 6, App. 7e ) and sent out a Notice of Election on October 29, 1974 (Govt. Ex. 7, App. 8e ). The ballots were submitted on or before November 25, 1974 (69).

Between the meeting of October 5, 1974 and November 25, 1974, Winston met with most of the pilots individually. The meetings with the pilots who were subsequently fired went as follows: Winston met with co-pilot Paul Sholl on October 24, 1974, and said, "If the union was voted in he would either be closing his doors and going to Florida, or he would cut back routes and flight crews" (359). Winston stated that a couple of the pilots had already offered their ballots as a showing of faith to the company, to which Sholl responded that he had received his ballot and had already sent it in (359). Winston asked Sholl how he voted and Sholl told him that he voted no (359). The significance of turning over a ballot in a National Mediation Board election is that a ballot which is not forwarded is deemed to be a vote against the union (67-8).

Winston met with Captain William Lamos on two occasions (387, 391). The first occasion was at Winston's office (387) and Winston asked Lamos how he felt about the union and what he felt about voting for the union (391). Lamos said he would like more time to think about it, and Winston requested that he make another appointment (391). At the next meeting, Winston told Lamos he would like to talk with him about his ballot, to which Lamos responded he felt like it was a personal matter and no one else's business but his (392).

Winston also met with co-pilot Ronald Williams (532). Winston asked Williams, "Would you like to show that you are for me", and "Would you like to give me your ballot." (532). Winston held up a pad to Williams and said it was a list of other pilots who had indicated they would give Winston their ballots (432-3). Williams told Winston that he didn't know

why they were collecting ballots because they could receive second ballots (533).

Winston called co-pilot Dennis Larrimore into his office on October 12, 1974 (622). Winston said he knew the ballots were going to be arriving on company property at any time, to which Larrimore responded that he had received his that day and had mailed it in (623-4).

Winston met with co-pilot James Hummel about November 4, 1974 (679). Winston asked Hummel if he had made up his mind on how he was going to vote, to which Hummel responded that he had not and that he was going to wait until a later date before making up his mind (679-80).

Several pilots who were not among those who were fired also had individual meetings with Winston: Winston spoke to co-pilot Douglas Ton during the course of a charter flight and said, "Would you be willing to show your support to the company by possibly turning over your ballot" (340). Ton subsequently turned over both his original and his duplicate ballot (340, 347). Winston met with captain Michael Kleitz outside of his office (481) and told Kleitz, "We have to know who is loyal. Will you give me your ballot." (481). Kleitz turned over his ballot to Winston about a week later (481). Winston called captain Jon Solberg into his office before the union election and said, "I want your ballot." (752). Solberg subsequently gave Winston two ballots (754). After the election, Bell approached Solberg and asked him to sign a statement that he did not vote in the election (756).

Solberg said he would sign it, but never did (756). It is noted that Ton, Solberg, and Kleitz were still employees of the company during the trial.

Winston met with captain Paul Briggs (800). Winston said, "I know that there is one way in which you cannot vote for the union ... if you give me your ballot." (801). Briggs asked Winston if he wouldn't get in trouble for doing that, to which Winston responded, "Don't worry about it." (801). Briggs subsequently gave Winston his ballot (801). Defense witness captain Bela Pusztai testified he also gave his ballot to Winston (1266). Defense witness captain Jon Harrington said he gave his ballot to Winston (1294) because "I knew that several of the other pilots had brought in their ballots, and I felt that it was to my benefit to do that also." (1294). Defense witness co-pilot Hugh T. MacDougald said he was called in by Winston to Winston's office (1348) and that during the course of the meeting Winston said that eighteen people had given him their support in terms of their ballot and Winston felt that was the right thing for the company (1349).

During the course of the election, the employees requested and received duplicate ballots from the National Mediation Board (66).

Ballots were received by the NMB on November 25, 1974 (69). Out of 21 eligible ballots, 16 ballots were cast for the Teamsters Union, and one ballot was submitted in blank (69).

On December 4, 1974, the NMB certified the Teamsters Union as the representative of the pilots (69, Govt. Ex. 14, App. 17e). Subsequent to the election, the employer sent letters through its attorney to the National Mediation Board challenging the election (70, Govt. Exs. 15 - 18, App. 19e - 25e). On January 9, 1975, the NMB confirmed the election (Govt. Ex. 22, App. 29e).

On December 9, 1974, Winston fired co-pilot Paul Sholl (355, 361). On December 13, 1974, Winston fired captain William Lamos (380, 398). On January 19, 1975, Winston and Bell fired Ronald B. Williams (534, 1789). On February 17, 1975, Winston and Bell fired Dennis Larrimore (625). On February 19, 1975, Winston and Bell fired James Hummel (670, 681).

Up until December 31, 1975, the defendants had not entered into a contract with the Teamsters Union. (Note 5, Govt. Ex. 47, 64e).

The defense was that all of the firings were for just cause and that while the recorded statements to the co-pilots of October 5, 1974, were substantially accurate, statements alleged to have been made by Winston and Bell at other times were inaccurate (1898 - 1909).

## POINT I

## THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY VERDICT BELOW

The defendants challenge the sufficiency of the evidence in two respects: first, the evidence that the defendants knew or strongly suspected that the discharged pilots were engaged in union activity, and second, the evidence that the defendants discharged the pilots wholly or partly for anti-union reasons. For purposes of this Point I, the defendants accept the trial court's definition of the substantive offenses (Br. 10) and, in any event, they took no exception to the charge. The jury instructions relative to this evidence are set out at 2136, line 24, to 2141, line 17. (The trial court incorporated these instructions by reference in the remaining counts).

In considering this issue, the court must consider the evidence in the light most favorable to the Government, taking into account the evidence presented by the defendant in addition to that offered by the Government. United States v. Mariani, 539 F.2d 915 at 917 (2d Cir. 1976). The court may consider that the defendant's testimony is so incredible as to furnish further support. United States v. Arcuri, 405 F.2d 691 at 695 (2d Cir. 1968), cert. denied, 395 U.S. 913.

The government submits that a review of the trial transcript will indicate that the evidence was overwhelming against

each and every defendant. Therefore, the government's following discussion of the sufficiency will be kept to a minimum. We turn first to the sufficiency of the evidence regarding knowledge of representational activities.

In the first place, the evidence was clear that Jon Harrington was a company spy. Harrington was the Assistant Chief Pilot and had been employed by the carrier for twelve years (1274-5). As Assistant Chief Pilot, his duties were mostly administrative, including scheduling and keeping pilots' records (1275). Harrington attended the initial organizational meeting on October 2, 1974 (100) and he attended two union meetings after October 2 (1288). Harrington admitted that as to the two meetings subsequent to October 2, 1974, he reported what happened to either Bell or Winston (1288). This included reporting "general things that I felt were of a nature serious enough that I felt I should discuss it with Bell . . ." (1289). Harrington also admitted reporting to Bell concerning Josephson's performance (1291). In addition, Harrington reported a conversation with fired co-pilot Dennis Larrimore in Washington, D.C. in which Larrimore said, "I hope that little S.O.B. /meaning the defendant Winston/ gets what is coming to him." (1292). It can be inferred that Harrington was the one who reported this back to Winston

(1809), since that was the exact language Winston recounted in his testimony (1810) and the only other person present, Captain Pusztai, could not recall the specific language Larrimore used (1259). Further evidence that Harrington was a spy developed from a deliberate lie, which was told only to Harrington. On about September 26, 1974, co-pilot Robert Slough told Harrington that Slough and three other co-pilots had helped Slough prepare the letter dated September 24, 1974 (124-8). Slough told no one else besides Harrington that story (170). However, on October 3, 1974, the day Slough was fired, Bell told Slough that Bell understood the letter had also been prepared by Josephson and DeLaurentis (98, 163). The totality of these circumstances constitutes overwhelming proof that Harrington was a spy for the company, reporting back everything that he heard and saw. Not only does the presence of a spy permit the inference of knowledge by the employer, but surveillance alone has been considered so detrimental to free elections that it has consistently been held to be an unfair labor practice under the National Labor Relations Act (NLRA). Consolidated Edison Co. v. NLRB, 305 U.S. 197, 59 S.Ct. 206 (1938). See also NLRB v. Grower-Shipper Vegetable Assoc., 122 F.2d 368 (9th Cir. 1941); Bethlehem

Steel Co. v. NLRB, 120 F.2d 641 (D.C. Cir. 1941).

Other evidence of knowledge includes that Winston himself admitted that he knew by September 25 or 26, 1974, about the letter of September 24, 1974, and that the pilots were considering selecting one of three unions (1848). While Winston testified that he first found out on October 7, 1974, that the Union interested in the pilots was the Teamsters, Bell told the pilots on October 5, 1974 that the choice was between "Jimmy Hoffa" or me. The jury could thus believe Winston was lying in denying knowledge of the Teamsters on October 5, 1974.

Of course, the strongest evidence that the defendants knew that the pilots who were discharged during and after December, 1974, were engaged in choosing a representative was because the pilots told Winston so during the course of his individual meeting with them. Sholl, the first co-pilot fired, told Winston he had received his ballot and had already sent it in (359). Lamos told Winston he felt his ballot was a personal matter and no one elses business but his own (392). Williams was apparently the first to tell Winston that the pilots could get duplicate ballots (533, 560). Williams also told Winston that he was listening to "both sides" (532). Larrimore told Winston he had already mailed his ballot in (623-4).

Hummel told Winston that he was going to wait before making up his mind (679-80).

There were only 21 pilots eligible to vote in the election, of which 16 cast ballots for the Teamsters Union and one pilot cast a blank ballot (69). Thus Winston had a fair idea that the five pilots named above were among the 16 voting against him.

The testimony of the pilots who were not fired is in direct contrast. None of them gave Winston any reason to believe in their meetings with him that they favored a union. Co-pilot Douglas Ton turned over both his original and duplicate ballots to Winston (346-7). Michael Kleitz gave Winston his ballot (481) and a false statement, subsequent to the election, that he had not voted (Govt. Ex. No. 20, App. 27e). Captain Jan Solberg gave Winston two ballots (754) and told Bell that he had not voted (756). Captain Paul Briggs gave Winston his ballot (801). Captain Bella Pusztai gave Winston his ballot (1266). Co-pilot Hugh T. MacDougald gave his ballot to Winston (1351). None of these pilots was fired. Accordingly, the evidence is clear that eight of the twenty-one eligible pilots convinced the defendants that they were in favor of the defendants. Two more, Managing Captain Donald M. Reeve (1361) and Assistant Chief Pilot Jon

Harrington were members of management and could be expected to favor the company. Of the remaining eleven pilots the defendants had definite reason to believe that five of them were in favor of the union, and it is not credible that their being selected for firing was mere coincidence. We turn next to the particular reasons given for firing each employee.

## THE ABSENCE OF JUST CAUSE FOR FIRING OF ROBERT SLOUGH, IRA JOSEPHSON AND MICHAEL BAAN

Winston and Bell testified that they arrived at a decision to fire Robert Slough, Ira Josephson and Michael Baan after an extensive review of all of the pilots employed by the company (1035-6). The testimony of Bell and Winston on the meetings at which this extensive review took place, however, was contradictory. Bell said he had a single meeting with Winston during which Winston said the company was over staffed (1034). At this meeting Bell said they discussed which pilots should be dismissed and decided to fire Slough, Josephson, and Baan (1036). Bell said this meeting took place between September 20 through 27, 1974 (1168). However, on cross-examination regarding a summary of incidents involving Slough in his personnel file (Govt. Ex. 41, 41e), Bell [later supported by Winston (1705)] contended that he and Winston discussed an incident involving Slough which according to the summary took place on

September 30, 1974 (1169), several days after he originally said he had the meeting. The incident involved an overbooking of passengers for a flight out of Elmira. Bell flew this flight to Elmira (1102), but it was shown on rebuttal, after Bell and Winston had testified, that the flight did not depart Elmira until ten minutes after five p.m., on September 30, 1974 (1942). (This rebuttal testimony was critical because it showed that in order for the story concerning the discussion of the pilots to be true, they had to have discussed all of the pilots sometime in the evening of September 30, 1974.)

Winston took the stand after Bell and said that there were two conversations with Bell. Winston said the first meeting with Bell was on about September 20, 1974 (1849) at which Winston told Bell that the company was in economic trouble (1394) and that Winston had decided that they were to cut back starting with the flight department (1415). Winston said that at that meeting he told Bell they would reduce their co-pilot staff in half, by discharging seven co-pilots (1417). Winston told Bell he wanted Bell to give him an evaluation of co-pilots so they could decide what sort of a cutback they were to have (1850). Thus, a second meeting was required. At the second meeting Winston said he and Bell discussed all the pilots in the

company (1459). They discussed "all the things we could think of, all the things we could dig up, and anything to do what we feel a fair evaluation." (1459). Winston testified on cross-examination that this second meeting took place on September 30, 1974 (1850), but neither Winston nor Bell could say what time of day that meeting took place (1851, 1935). However, it is clear that in order for Bell's testimony that they considered the flight of September 30, 1974 to be true, the meeting had to have taken place in the evening of September 30, 1974. Their story is too incredible to believe, since if they considered all of the pilots in the detail to which they testified, the meeting would have taken a substantial amount of time and they could not have forgotten that they would have consumed almost an entire evening discussing the matter. The Government contends that the entire testimony concerning these meetings was incredible and that the meetings were a fabrication.

With reference to the firing of Slough, the defendants Winston and Bell, as they did with all of the fired pilots except Michael Baan, testified that there was just cause for the firing. A detailed discussion of those reasons alleged as cause will not be undertaken. Most of the reasons given involved complaints which, as the trial progressively made clear, the defendants had not thought were

serious at the time they happened. Evidence that the reasons were contrived, rather than actual, are based upon Bell's testimony that only more serious infractions get recorded as notes in the personnel file of the employee and get taken up with the defendant Winston, while less serious infractions don't get in the file and don't get taken up with Winston (1161). With reference to Slough, there were no notes in the file contemporaneous with an incident (1161). The only notation in Slough's personnel file was a summary (Govt. Ex. 41, 41e) which Bell said was made "approximately" at the time of his conversation with Winston about firing Slough (1165-6). There was extensive questioning of Bell, however, concerning the absence of critical notations in the file regarding Slough (1162-1166). Slough asked Winston for a written statement of the reasons he was fired and was refused (104).

Apparently, feeling that the absence of notes in the file were detrimental to their case, the defendant Winston, when he testified, produced Defense Exhibit Z (App.75e ). Winston said that Defense Exhibit Z was a memo given to him by his son during August, 1974 (1482). Defense Exhibit Z, however, referred to an incident where Slough was "unavailable for a flight in Elmira." However, on cross-examination Winston said that the company did not start

their operations in Elmira until September, 1974 (1887). It was thus clear that Defense Exhibit Z was falsified. This provides additional evidence that Winston deliberately lied on the stand in a material matter, and the jury could have disbelieved all or any part of his testimony.

Ira Josephson was allegedly discharged for poor performance (1706, et seq.); however, there was only one note in Josephson's file and it was dated February 16, 1974 (1185), about eight months before Josephson was fired. No performance reason was given for firing Michael Baan. The reason given was that Baan had been there only about two weeks and they had invested little training in him (1718). However, the defendants had also hired three co-pilots at about the same time they hired Baan but retained these three co-pilots over Slough and Josephson (1187).

## THE ABSENCE OF JUST CAUSE FOR THE FIRING OF PAUL SHOLL

Paul Sholl was fired on December 9, 1974 (1766). Winston testified that he fired Sholl because he had been negligent in opening a door to an airplane and that he failed to exercise his duties properly when he failed to report that the door had free-fallen. (1772). The door was damaged during an incident which happened on December 6, 1974 (374). Sholl was co-pilot on a plane on which Michael Kleitz was captain and in the course of opening the door,

a snubber failed to catch. Kleitz testified that he heard the door crash and that he radioed the office to request a mechanic to check the door (493-4). Kleitz said he told the mechanics that the door had free-fallen and bottomed out and that the snubber had broken (495). Kleitz also testified that he heard Sholl tell the mechanics that the door had bottomed out (495). Kleitz said it was obvious that the door was damaged and he took the airplane back to the hangar (495). Kleitz also testified that when he heard Sholl was fired he went into Winston's office to explain what happened (496) and that Winston said, "Don't tell me what happened. I know what happened." (497).

Paul Briggs, who was one of the ground school instructors for the company (804) had an accident in March, 1974, when a snubber failed (806). The door was damaged quite severely (806) and Briggs said that in his opinion, in the event of snubber failure he would not be able to keep the door from free-falling. (807). Briggs also testified that in his nineteen years as a pilot he had heard of a snubber failing three times (841) once with him, once with Sholl, and another time with co-pilot Gary Leonard (842). The following pilots caused substantial damage to aircraft owned by the defendants but were not discharged: Paul Briggs (1914); Jon Harrington (1914) Bela Pusztai (1263).

Sholl testified that in the week following October 2, 1974 he and co-pilot Dennis Larrimore arranged a union meeting in the social room of the apartments that Sholl was living in at the time (356). Jon Harrington attended that meeting (356) and Alex Calder was there (357). At the end of the meeting Sholl spoke with Alex Calder, during which conversation Calder thanked Sholl (357). Harrington was close enough to hear that conversation (358).

## THE ABSENCE OF JUST CAUSE FOR FIRING OF WILLIAM LAMOS

Winston testified that William Lamos was fired for failure to obey an order to test-fly an airplane (1788). Lamos testified that he was ordered to test-fly the airplane on a fifteen minute rest stop, and refused (393-7). Lamos was pilot on a flight which arrived in Binghamton with a load of passengers. A fifteen minute rest stop was scheduled in Binghamton and Lamos was to continue on with the passengers to another destination. However, the company informed him that he was to test-fly an airplane during the rest stop which was to be used to carry the passengers (393). Lamos testified that it was impossible to conduct a test flight in fifteen minutes, and it would have taken thirty-five to forty minutes to test fly the plane (393, 397). There were other planes available to fly the passengers (398-9), and Lamos refused to fly the test flight, whereupon

Winston fired him (398). The following pilots testified that on no other occasion had a pilot been asked to test-fly an airplane during a fifteen minute stopover; Lamos (399), Michael Kleitz (487), Paul Briggs (803).

Captain Michael Kleitz, however, revealed the true intentions of the defendants. Kleitz testified that he had a conversation with Bell and Harrington two to three weeks before Lamos was fired (487). Kleitz said they were discussing the union and a point was raised that Mr. Lamos had been quite vocal at the very first meeting at my house [In August, 1974 (380)]. Kleitz testified Bell said "Lamos was a rebel-rouser, and shouldn't.- He shouldn't be here, or shouldn't be around.' (488). The evidence is clear that William Lamos was deliberately provoked by the defendants and that he was justified in refusing to test-fly the airplane under circumstances in which no other pilot in the company had been asked to do those duties, and where there was an alternate airplane available.

## THE ABSENCE OF JUST CAUSE FOR FIRING OF RONALD WILLIAMS

Co-pilot Ronald Williams was fired on January 9, 1975 by Winston (534). Winston told him that they were letting him go because they were over-staffed (535). Williams was told that he was selected for firing because he had trouble

with a customer at a ticket counter (536), that Williams didn't want to fly (537), and that Williams had not obtained his Airline Transport Rating from the Federal Aviation Administration (541). /Slough t[illegible]ified that the Airline Transport Rating, which he got about one month after being fired (179) is the highest rating a pilot can obtain (178)7 Williams was the senior co-pilot with the company, having been employed with them since 1968 (530). However, there was only one critical note in Williams' personnel file which note was dated January 7, 1974, more than a year before Williams was fired. The note was to the effect that Williams had over-slept and delayed a flight approximately twenty minutes (1200-01). There was also, however, an undated letter in the personnel file to Williams from Bell thanking him for the fine efforts he had made in the last year in improving his work attitudes and level of cooperation (Govt. Ex. 42, App. 42e ) (1201). To put these notes and criticisms in proper perspective, the government introduced Government Ex. 43 (43e)which was two notes in the file of co-pilot Thomas Lewis dated December, 1974. The first Lewis note read that Lewis was to be away for two days but that he did not call and stayed away two weeks. The second note was dated December 31, 1974, within three weeks of the day Williams was fired, and set forth that

Lewis was scheduled for a flight at 8 o'clock on December 30, 1974 but did not show up for the flight, and that first officer Ton had to be called for the flight which was delayed twenty minutes. (1215-16).

With reference to the necessity for an Airline Transport Rating, the best evidence of the value of that rating to a co-pilot is obtained by considering that the next co-pilot fired was the only one in the employ of the defendants, who did have an Airline Transport Rating: Dennis Larrimore.

## THE ABSENCE OF JUST CAUSE FOR FIRING DENNIS LARRIMORE

Co-pilot Dennis Larrimore was fired on February 17, 1975 (620). He was the only co-pilot employed by the defendants who had the Airline Transport Rating (621). At the time Larrimore was fired by Winston, Winston told him that he was being terminated because he would be of less value to the company in the future (626). Larrimore asked for a letter but Winston refused to give him any (628). Winston testified that among the reasons he fired Larrimore was because Larrimore called him a little son-of-a-bitch. (1809).

The most persuasive evidence that Larrimore was fired for union reasons came from Captain Jan Solberg. Solberg testified that he had a conversation with Bell about a week before Larrimore was fired (757). Solberg testified that he

was supposed to take another flight with Dennis Larrimore, and Bell "asked me to talk to Dennis because he thought he was a little bit too vocal about his support for the union." (758).

## THE ABSENCE OF JUST CAUSE FOR FIRING OF JAMES HUMMEL

Co-pilot James Hummel was fired on February 19, 1975. Hummel testified that Winston told him that the reason he was fired was because the company was over-staffed (683). Winston testified that Hummel was fired to bring the co-pilots down to the number seven as previously decided in September, 1974. (1800). Winston testified he considered Hummel's failure to buy a uniform (1800), incidents of non-availability, lateness for counter duties, and missing money (1801). Bell testified, however, that there was only one note in Hummel's file which was dated January 6, 1975, relating to an incident in which Hummel was twenty minutes late for a flight (1220), but that Hummel did not delay the flight, however, because he was twenty minutes late only into a forty-five minute lead time. (1220). There were no other notes. Paul Briggs testified that he didn't get a uniform for 2 1/2 years after coming with the company (803).

## THE ABSENCE OF ECONOMIC REASONS

Winston said that he had decided during September, 1974 to reduce the co-pilot staff to seven (1415) and that with the firing of Hummel, the co-pilot staff had finally been reduced to that figure on February 19, 1975 (1800). While Winston said his decision to cut back was for economic reasons (1394-1415), these reasons were not substantiated: during his testimony Bell said that the company did not dispose of any aircraft on or about October 3, 1974, and that they did not cancel any scheduled flights or refuse any charters (1149). While Bell said they did a great deal of combining flights (1149), Winston testified to only minor schedule changes (1452-53). Kleitz testified he believed the number of flights stayed constant (492).

With regard to Winston's testimony that on September 20, 1974 he decided to cut his co-pilot staff in half because of economic reasons, and before he found out about the Union, he was either lying on the stand or he was lying to his pilots on October 5, 1974 when he told them

> We have a stable business that is growing, and we are growing, and the people inside are growing. (464).
>
> Now, I tell you how we have been affected just with the news of this week that the Union's coming in . . .. All because of this news here I'm not going to expand it is fact. I'm not going to buy that Citation, I can't afford to take that risk. Economic risk with an unstable organization (456-7).

Accordingly, those statements on October 5, 1974 were admissible as prior inconsistent statements by Winston, and were so argued by the government to the jury in summation (1954-5). Winston testified that he made the decision to cut back co-pilots instead of captains because once they find captains "they are like gems, we don't want to lose them." (1416). While this might be a reason to fire a co-pilot over a captain in the event of a cutback, it cannot explain why Winston hired new captains after he had decided to cut back his staff and before he had reduced his co-pilot staff to seven. The defendants hired F. J. Greenall during December, 1974 (763 and Govt. Ex. 40 App. 40e ). /Government Exhibit 40 was received in evidence at 1127. Captain Solberg testified that Greenall performed co-pilot duties, for about 4 or 5 months after he was hired (763). Henry Melich was hired as a captain during February, 1975 (762 and Govt. Ex. 40 , 40e), and also performed co-pilot duties for about five months (763). William Poterbin was hired as a captain during February, 1975 (1203). Following the firing on February 19, 1975, of the last of the pilots named in the indictment, the defendants immediately began hiring replacement co-pilots. They hired co-pilot Maretti on March 23, 1975 (1241), co-pilot McKeen on April 13, 1975 (1241), co-pilot Maido on May 4, 1975 (1241), co-pilot Paul Darby on May 4, 1975 (1242) and Allen Garren as a part-time

co-pilot commencing May 11, 1975, and a full-time co-pilot on June 8, 1975 (1242). Thus there is adequate evidence that the defendants utilized captains to perform co-pilot duties while they were using a reduction of staff as a pretext to get rid of the co-pilots who had appeared to favor unionization, and as soon as the co-pilots had been discharged, the defendants immediately took steps to raise the co-pilot staff to its previous levels. (See Govt. Ex. 40, App. 40e ).

Thus there is clearly substantial evidence in the case to show that the defendants knew that all of the pilots named in the indictment were engaged in union activities, that the reasons given for firing each pilot were pretextual, and that each of the pilots were discharged wholly or partly because of their representational activities.

## POINT II

THE TRIAL COURT EXHAUSTIVELY INSTRUCTED THE JURY THAT SPECIFIC INTENT IS REQUIRED AS A MATERIAL ELEMENT OF THE CRIME CHARGED AND ERROR, IF ANY, CANNOT NOW BE RAISED SINCE THE DEFENDANTS TOOK NO EXCEPTION TO, AND EVEN ENCOURAGED, THE INSTRUCTIONS GIVEN.

The defendants boldly assert that "the trial court failed to instruct the jury, in this first trial under the statute, that willfulness is an element of the offense." (Br. 28). Of course, paragraph Tenth specifically requires that the offense be "willful", and the trial court exhaustively instructed the jury on this element, as follows:

> The fourth element is that in discharging or causing the discharge of the named employee, the Defendant acted knowingly, willfully and intentionally, wholly or partly for the purpose of interferring with, influencing or coercing one or more employees in the exercise of the protected right freely to choose a representative.
>
> Now, there is a sharp dispute in the evidence about this element. Here the word 'knowingly' does not mean that a Defendant must know or be aware that his conduct violates the Railway Labor Act or any other law. In short, the Defendant doesn't have to know the law. It simply means that the Defendant must be conscious of what he is doing. In other words, that he is consciously interferring with, influencing or coercing the employee or employees in his or their free choice and

> free exercise of protected rights, or that he is retaliating against them, or him, for having exercised a protected right.
>
> 'Intentionally' means that a Defendant acts voluntarily, deliberately, and on purpose, and not because of a mistake, accident, carelessness or other innocent reason. An act is done willfully in the context of this case if it is done knowingly, intentionally, purposefully or deliberately by the Defendant, wholly or partly for the purpose of thwarting the object of the law to prohibit employers from interferring with employees' free exercise of their protected rights to choose a representative, to organize and bargain collectively with their employer. (2136-2138).
>
> In determining whether the Defendant acted willfully, knowingly and intentionally in discharging the employee, you should consider whether his words and conduct were either wholly or partly motivated by an intention to interfere with protected rights, or intended to thwart or frustrate the declared purpose of the law to protect the employees' rights to choose their representative, and to organize without employer interference. (2139-2140). (Emphasis supplied).

In provisions quoted above, the trial court defined the material elements for Counts II through VIII. The trial court incorporated this definition in defining the material elements of the violation of Counts X and XI (2142), and Counts XII through XVI (2144).

The instructions conform to the basic specific intent charge. See Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031 (1945):

> We recently pointed out that 'willful' is a word of many meanings, its construction often being influenced by its context. ... But, 'when used in a criminal statute, it generally means an act done with a bad purpose. [Citations omitted]. In that event, something more is required than the doing of the act proscribed by the statute. [Citation omitted]. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. ... An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. ... But, where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. 325 U.S. at 101, 65 S.Ct. at 1035

The defendants now contend that the instructions involving knowledge and willfulness are in error in two respects. First, that the employer must know of the legal obligation imposed by the Act, and act with the intent to violate the law, or act in obstinate disregard of his legal obligation. Second, and this is in two parts, that with respect to discharges, the employer must (a) actually know that the discharged employee was engaged in union activity, and (b) that anti-union animus was the sole, or at least the principal, reason for the discharge. We turn first to the defendant's acquiescense in the charge as given by the trial court.

## A. IGNORANCE OF THE LAW DEFENSE

### 1. THE DEFENDANT IS ESTOPPED FROM OBJECTING TO ANY FAILURE TO INSTRUCT CONCERNING DEFENDANT'S IGNORANCE OF THE LAW.

The defendants took no exception to the charge (2156-7). They suggest that this should be excused because they had submitted written requests, and by doing so had made their positions known in advance (Br. 30). This totally ignores the defendant's position during the trial, however. On the first day of trial, the Government offered proof that the defendants had been specifically apprised in 1970, about four years prior to the acts charged, of the provisions of the Railway Labor Act which they are now charged with violating. The Government's proof involved Government Exhibits 1 and 2 (App. 1e & 2e). The exhibits were not received in evidence, but they were identified, and an offer of proof was made by the Government. (58-62, 85). Government Exhibit 1 was a letter to the defendant Winston from the mediator for the National Mediation Board. The letter states, in part, that:

> Also, I am enclosing a copy of the Rules which you have requested.

Government Exhibit 2 (App. 2e), consists of attachments to Exhibit 1 and includes the following statement:

> Section 2, Fourth, of the Railway Labor Act as amended, provides that 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act.' Attention is called to Section 2, Railway Labor Act, providing that elections shall be free from interference, influence or coercion, etc., also that it is unlawful for any carrier to interfere in any way with the organization of the employees, etc. (Underlining from original).

In seeking to introduce Government's Exhibits 1 and 2, the following colloquy ensued (61-62):

> Mr. Richards: We have no knowledge of any of this, if he is going to get into it, and whether or not it shows the intent of the Defendant -- I don't see where it shows anything. I didn't realize that we were going to open the door to the 1970 election.
>
> The Court: Do you have any objection, and if so, state your objection.
>
> Mr. Shanahan: Well, I would think, Your Honor, that the prime objection on this would be that it is outside the scope of the indictment, and as Your Honor states, I presume that everybody is supposed to know what the law is. I think that I understood this correctly and he is simply trying to bring home the direct notice of the rules. I don't know whether that is as far as he wants to go?
>
> The Court: Do you think that that may be prejudicial in opening another labor dispute?
>
> Mr. Shanahan: It shows an earlier controversy on this same matter, and therefore it might be.

> Mr. Chalenski: I only want to introduce them, and nothing further.
>
> The Court: But you did not imply that. I will sustain the objection. I don't think that it is material. (Emphasis supplied).

The defendants not only took no exception to the charge concerning knowledge of the law, but from the discussion surrounding the introduction of Government's Exhibits 1 and 2, the defendants sought to prevent the introduction of testimony which they believed would harm their overall case by conceding that all defendants are presumed to know the law.

The defendants purposely argued that everyone is presumed to know the law in order to keep from the jury evidence that the defendants had been engaged in a prior proceeding with the National Mediation Board. The defendants specifically stated that evidence of this prior dispute was prejudicial. The defendants deliberately chose their course of action for their own best interest and invited the Court to charge the jury that all persons are presumed to know the law.

Rule 30 of the Federal Rules of Criminal Procedure provides in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Failure to comply with Rule 30 precludes a party from raising the point on appeal, unless it constitutes "plain error". Rule 52(b), Federal Rules of Criminal Procedure. United States v. Friedland, 391 F.2d 378 (2d Cir. 1968), cert.den., 404 U.S. 867 (1971).

The Supreme Court has held, under circumstances similar to those present here, that the defendants are not entitled to object on appeal, and it is worth quoting at length because the case will be applicable to several other arguments raised by the defendants:

> But we do not grant a new trial because of one circumstance which seems to us controlling. As we have noted, though an exception was taken to the prosecutor's comment on petitioner's refusal to testify, it was later withdrawn. And when the court invited counsel to bring to its attention any objections or requests to charge, counsel did not renew the objection. ... We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court. It is true that we may of our own motion notice errors to which no exception has been taken if they would "seriously affect the fairness, integrity, or public reputation ofjudicial proceedings." /Citation omitted/. But we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court /citation omitted/ is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. In such a situation the rule stated by Mr. Justice Sutherland

> in United States v. Manton, 2 Cir., 107 F.2d 834, 848, is applicable: "If failure to enter an exception or assign error had been a mere inadvertence the matter might stand in a different light. But that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied. We see no warrant for the exercise of our discretion to set aside standing rules, so necessary to the due and orderly administration of justice, and review the challenge to the legal accuracy of the charge where, as here, the failure of the judge to follow the text of the requested instruction was, at the last, induced by the action of counsel * * *." Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be re-opened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549 (1943) reh.den. 318 U.S. 801, 63 S.Ct. 826.

See also United States v. Hynes, 424 F.2d 754, 758 (2d Cir. 1970), cert.den., 399 U.S. 933 (1970); ("Failure to object may have been trial strategy."); Vuckson v. United States, 354 F.2d 918, 922 (9th Cir. 1966), cert.den., 384 U.S. 991, reh.den., 385 U.S. 893.

Even assuming that it was error to fail to charge the jury that the defendant is required to know the law, such error would be harmless error under the circumstances of this case, since it is inconceivable that the jury could have found that the defendants were ignorant of the Act.

Independent evidence was received to show that the defendant was apprised of the relevant provisions of the Act. See Government Exhibit 8 (App. 9e ), which is a Notice of Election, containing at page two, opposite the word "Notice", a provision similar to the one quoted above, notifying the defendant of the provisions of the Act. This Notice of Election was sent to the defendant on October 29, 1974 (65 and Govt. Ex. 7, App. 8e).

In addition, captain Michael Kleitz testified that during October, 1974, he asked Winston if it wasn't illegal for Winston to have his ballot, to which Winston responded, "Don't worry. Don't worry about it." (480-82). Pilot Paul Briggs testified that he met with Winston prior to the election and that Winston solicited his ballot. To this solicitation Briggs responded, "Won't you get in trouble doing that?", and Winston responded, "Don't worry about it." (801).

Although both of the defendants, Winston and Bell, testified, neither offered any evidence that they were unaware of the requirements of the Act, nor did either of their attorneys argue that they were ignorant of the law in summation.

Thus, for the purpose of determining whether the defendants were aware of the statute, there is both the offer of proof concerning the 1970 Notice, which for this purpose must be deemed admitted against the defendants and the Notice which the defendants received in 1974, and the statements by Winston to his employees that he was aware of the requirements of the law. This evidence was overwhelming, and presumably played a role in the decision of the defendants to ignore the defense of mistake of law and choose instead to keep out evidence of the prior proceeding before the National Mediation Board. Under these circumstances, the error should not be noticed under Rule 52(b) since it did not effect the "fundamental fairness of the trial" or the "integrity of judicial proceedings", nor did it inflict "serious injustice" upon the defendant. United States v. Bryant, 480 F.2d 785, 789 ftn. 3 (2d Cir. 1973). As the Supreme Court stated in Anderson v. United States, 417 U.S. 211 94 S.Ct. 2253 (1974),an inadequate record may make it inappropriate to find plain error:

> And, even assuming, arguendo, that §241 is limited to conspiracies to cast false votes for candidates for federal offices, we could find no plain error here. The prosecution's case, as indicated earlier, showed a single conspiracy to cast entire slates of false votes. The defense consisted in large part of a challenge to the credibility of the Government's witnesses, primarily the three

unindicted coconspirators. The case therefore ultimately hinged on whether the jury would believe or disbelieve their testimony. Given the record, we think it inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well.

This case is therefore an inappropriate vehicle for us to decide whether a conspiracy to cast false votes for candidates for state or local office, as opposed to candidates for federal office, is unlawful under §241 . . . 417 U.S. at 227, 94 S.Ct. at 2264.

## 2. IN ANY EVENT THE RAILWAY LABOR ACT DOES NOT REQUIRE PROOF THAT A DEFENDANT KNOWS THE REQUIREMENTS OF THE ACT

"It is a well-settled common law rule that a mistake of law as a result of which the defendant does not know that his conduct is illegal, does not operate as a defense in most criminal cases." Hall and Seligman, Mistake of Law and Mens Rea, 8 University of Chicago Law Review, 641 (1940). United States v. International Mineral and Chemicals Corp., 402 U.S. 558 (1971). The defendant points to the legislative history of the Railway Labor Act and a colloquy during the hearings before the House Committee of the Railroads between Federal Coordinator of Transportation Eastman and Mr. M. W. Clement, Chairman of the Committee, that the word "willful" in the statute was meant to entail "the most difficult burden of proof on the Government." The defendant also points to a statement by Mr. Eastman that "experience has shown that it is a difficult matter to secure a conviction with [the word willful] in a statute and requires an array of most convincing evidence. This reference to "evidence", of course, on its face refers to the more stringent burden of proof in a criminal case than that required in a civil case. See United States v. J. N. Huber Corporation, 179 F.Supp. 570, (S.D. N.Y.,1959). In Huber, the court reviewed an Indictment under the Sherman Act and stated:

> No reason is suggested why conduct, which has been proved to violate the statute and thus merit an injunction against it, should by virtue of that injunction be absolved from criminal consequences despite the Government's ability to prove it by the requisite degree of proof for a criminal conviction. 179 F.Supp. at 572.

In 1934 when the Congressional hearings were held, the defense of ignorance of the law was one which had been applied in a very limited number of cases, such as in a revenue statute, see United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223 (1933). The apparent reason for the general disfavor of ignorance of the law as a defense can be attributed to the difficulty of deciding such a question. See Hall and Seligman, Mistake of Law and Mens Rea, supra, 646 et seq.*

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* There are two pragmatic bases which have been advanced to justify the retention of the rule in modern times. Austin felt "if ignorance of the law were admitted as a ground of exemption, the courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable." . . . The theory suggested by Holmes as underlying the general rule is that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." 8 University of Chicago Law Review at 646-648.

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Yet it is apparent from the legislative history that
gress was not trying to place hurdles in the path of
orcing the new amendments to the Railway Labor Act,
instead was trying to provide sanctions which would
teeth into the Act.:

> The Board of Mediation, as now set up, has been unsatisfactory because there are no teeth in its operations. Under this bill, the carrier who fails to comply with the provisions of the Act shall be subject to a fine of $1,000 to $20,000. Volume 78 Cong. Rec. 11718 (June 15, 1934) (Remarks of Mr. Mead)

> The act prescribed a definite procedure for collective bargaining by independent parties freed from interference, influence, or coercion, and set up machinery for mediation, arbitration, and fact finding; but it provided no penalties or other specific means of enforcing the duties which were imposed. The two parties wished to see the experiment tried; they were very hopeful of good results; but neither was sure of the outcome. This Railway Labor Act has now been tried for a period of nearly 8 years. It has served a very useful purpose and has brought about many good results, but experience has shown that it is in need of improvement. It does not depart from the general principles of the present Railway Labor Act, but, instead [illegible] designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done. Volume 78 Cong. Rec. 12396 (June 18, 1934) (Remarks of Mr. Hastings quoting Mr. Eastman).

The Supreme Court has stated that specific legisla-
ve history is required before it can be concluded
at Congress intended to provide a defense of ignorance
the law. The Supreme Court in United States v.
ternational Minerals and Chemicals Corporation, 402 U.S.
8, (1971) addressed the question of whether ignorance of
e law was an excuse for a violation of 18 U.S.C. §834(f)
ich provided criminal sanctions for violations of
gulations promulgated by the Interstate Commerce Commission.
e Court stated at 563 as follows:

> But it is too much to conclude that in rejecting strict liability the House was also carving out an exception to the general rule that ignorance of the law is no excuse.
>
> The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. In the context of these proposed 1960 amendments we decline to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the fact, and that it intended to endorse that interpretation by retaining the word "knowingly." We conclude that the meager legislative history of the 1960 amendments makes unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained under this Act.

The defendant suggests that that the Interstate Commerce Commission cases referred to in the colloquy between Mr. Eastman and Senator Dill in the legislative history to the 1934 amendments incorporates an intention by Congress that ignorance of the law should be a defense. A review of the Interstate Commerce Commission cases up until 1934, and following, shows that they do not stand for that proposition at all. For example, in United States v. Philadelphia & R. Ry. Company, 223 F. 215 (E.D.Pa. 1915), (a companion case to the one cited by the defendants at the footnote at Br. 35) the court stated:

> Properly, therefore, failure to obey is not made punitive unless the failure is with knowledge and willful. In a word, it must reach the grade of disobedience. Carriers are, of course, bound to know the law. 223 F. at 214.

In United States v. Illinois Cent. R. Co., 303 U.S. 239, 58 S.Ct. 533 (1938), the Supreme Court made clear that the definition of "willfully" in the Cruelty to Animals Act was meant only to encompass negligent behavior as opposed to behavior requiring an evil purpose. The Supreme Court stated:

> As respondent could act only through employees, it is responsible for their failure. To hold carriers not liable for penalties where the violations of sections 1 and 2, 45 U.S.C.A. §§71, 72 are due to mere indifference, inadvertence,

> or negligence of employees would defeat the purpose of section 3. 303 U.S. at 244, 58 S.Ct. at 535.

A statute which is closely analogous to the Railway Labor Act is Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. Section 186.* Both the Railway Labor Act and Section 302 of the Taft-Hartley Act have criminal misdemeanor sanctions, both concern relationships between management and labor representatives and both require a willful violation. In the cases decided under Section 186(d) it is established that the statute is malum prohibita and that willful, as used in the Act, does not require knowledge of the statute. United States v. Overton, 470 F.2d 761 (2d Cir. 1972), cert.den. 411 U.S. 909; United States v. Lanni, Sr., 466 F.2d 1102 (3rd Cir. 1972); United States v. Ricciardi, 357 F.2d 91 (2d Cir. 1966), cert.den. 384 U.S. 942; United States v. Ryan, 350 U.S. 299, 76 S.Ct. 400 (1956). In United States v. Ricciardi, supra, the Second Circuit stated as follows:

> If the Government had to prove evil motive in every case under the statute, its burden would become very much heavier. ... Nor did the trial court err in failing to give Unger's requested charge that the jury must find Unger not guilty unless they find that Unger knew he was violating the law or acted in reckless disregard of the requirements of the law. (357 F.2d at 99-100).

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* The Railway Labor Act was apparently intended to be a forerunner of subsequent labor acts: "The proposal

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before us today will do us a great deal towards setting an example for other industries, and should set an example for a labor-disputes act which might well lead the way to peace in industry, rather than riots and strikes which we are having throughout the country. Volume 78, Cong. Rec., 11,720 (June 15, 1934) (Remarks of Mr. Monaghan).

## B. THE DEFENDANTS SHOULD NOT ESCAPE LIABILITY BY CLOSING THEIR EYES TO UNION ACTIVITY AND BY SEIZING UPON PRETEXTUAL GROUNDS FOR DISCHARGE.

### 1. THE DEFENDANTS HAVE FAILED TO PRESERVE APPEAL ON THIS ISSUE

The defendants argue that the trial court should have charged the jury that the Government was required to prove "that the defendant actually knew that the discharged employee was engaged in union activitiy" (Br. 29). The trial court's charge in this respect is:

> Before you can find that a Defendant acted unlawfully in discharging or causing the discharge of the employee, you must first determine that the Defendant knew that the employee had participated in, or was engaged in, exercising his protected right freely to choose a representative. In this connection, you should consider the size of the Defendant companies, the number of employees, and the Defendant's general awareness or lack of awareness and attention to his business and what was going on around him.
>
> You should also consider whether the organizational activities were open and obvious, or secret, and in either case, the number of people who knew what was happening and the likelihood or improbability of a leak of information, an informant, or if you will, a grapevine carrying the message to the employer-Defendants.
>
> You may find that a Defendant had such knowledge if you find, from all the circumstances shown in the evidence, including the timing and sequence of events, either that the Defendant had actually been informed and therefore knew that the employee named in the count that you are considering had participated in any way or was participating in any way in the exercise of the protected right

> to designate a representative; or if you find that the Defendant had a strong suspicion, or was aware of a high probability, that the employee had participated or was participating in choosing a representative but purposely closed his eyes and his ears, or otherwise deliberately avoided learning the truth about the employee's activities, in order to make his actions appear to be sincerely based on the grounds on which they were placed.

The substantial difference between what the defendants contend should have been charged and what was actually charged, is the language relating to suspicion in the third paragraph quoted above.

The defendants, however, encouraged this language by their proposed Request for Instruction No. 4 **(Def. Ex. A - L)**:

> 4. To find the defendants guilty of conspiring to violate or violating subdivisions 3, 4, and 10 of §152 of the Railway Labor Act there must be evidence beyond a reasonable doubt and not fragmentary and unrelated suspicions that the defendants, as employers, knew, or had a strong suspicion, that the employees who were discharged were members, or assisting in the organization, of a labor organization seeking certification at employer's place of business and that the discharge of the employee came about because of his union activity. (Emphasis supplied).

Since the defendants affirmatively requested the charge concerning knowledge of union activity, and failed to accept the charge as given, there is no error. Johnson v. United States, supra; United States v. Hynes, supra; Vuckson v. United States, supra.

In any event, an instruction that the defendant may not create deliberate ignorance has been approved in this Circuit. United States v. Dozier, 522 F.2d 224 (2d Cir. 1975) cert.den. 423 U.S. 1021, 96 S.Ct. 461.

As to anti-union animus, defense counsel concede that there was no request concerning whether anti-union animus must be the sole or principal motivating factor (Br. 29-30). Since defendants failed to object to the instruction the charge as given should be affirmed for failure to comply with Federal Rules of Criminal Procedure 30. United States v. Friedland, supra, and in view of the overwhelming evidence of anti-union motivation in the record, for failure to establish plain error. Anderson v. United States, supra.

In any event, partial motivation has been approved in cases decided under both the Railway Labor Act and the National Labor Relations Act: NLRB v. Erie Resistor Corporation, 373 U.S. 221, 227, 83 S.Ct. 1139, 1144 (1963); Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974); NLRB v. Fairview Hospital, 443 F.2d 1217, 1219 (7th Cir. 1971).

## C. THE RAILWAY LABOR ACT IS SPECIFIC AND THE ACTIONS OF THE DEFENDANTS WARRANT CRIMINAL SANCTIONS

The defendants do not specifically argue that the statute is unconstitutionally vague on appeal, although the point was raised below. They do argue (Br. 41) that the statute should be narrowly construed, relying upon cases which have held statutes unconstitutionally vague unless narrowly construed. The Supreme Court has held, with reference to the provisions of the Railway Labor Act charged in the instant case, that the statute is clear:

> The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well-understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. Noscitur a sociis. Virginia v. Tennessee, 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort

in connection with the selection of representatives for the purpose of this act than in relation to well-known applications of the law with respect to fraud, duress, and undue influence. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates.

In reaching a conclusion as to the intent of Congress, the importance of the prohibition in its relation to the plan devised by the act must have appropriate consideration. Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. Texas and New Orleans Railroad Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 at 568 (1930).

The defendants also argue that there is a broad range of remedies available for enforcement of the Railway Labor Act (Br. 37). It is clear, however, that the mere fact that civil remedies may be available does not bar a criminal prosecution. See Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156 at 161, 43 S.Ct. 47 at 49 (1922); United States v. J. N. Huber Corporation, 179 F.Supp. 570 at 571 (S.D.N.Y. 1959). It must also be noted that no provision is made in the Railway Labor Act, as was made in the National Labor Relations Act some thirteen years later, for administrative proceedings to provide enforceable remedies arising out of representation disputes. It has been held with regard to paragraph Tenth of Section two of the Railway Labor Act charged in this case that:

> This provision cannot be construed as burdening the Department of Justice with the duty to represent every employee, or group of employees, who may assert civil rights under §2 of the Act. It merely broadens the duty of the Department of Justice by giving it specific responsibility to enforce the criminal sanctions imposed by the section . . .
> Cepero v. Pan American Airways, Inc., 195 F.2d 493 (1st Cir. 1952).

With reference to the defendants contention that there was a retroactive application of the statute,

the defendants totally ignore that the provisions of the Railway Labor Act have been determined to be unambiguous since the Supreme Court's pronouncement in Texas and New Orleans Railway Co., supra. The defendants point to no judicial enactment upon which they relied prior to the instant case, see Marks v. United States, S.Ct. Docket No. 75-708 (decided March 1, 1977), but the defendants instead point to reliance upon statements made by the prosecutor at the commencement of the trial. Since the acts charged occurred long before the trial, the defendants, accordingly, could not have relied upon the statements by the prosecutor. In any event, it would be logical fallacy for the defendants to argue that they relied upon a definition of specific intent which required knowledge of the statute before they performed their acts, since to have had such reliance, would have mandated that they had the knowledge required by the statute.

## POINT III

## SPEECH WHICH IS THREATENING DOES NOT VIOLATE THE FIRST AMENDMENT AND A CONSPIRACY CONVICTION BASED UPON (1) THREATENING SPEECH, (2) SOLICITATION OF BALLOTS, AND (3) UNLAWFUL DISCHARGES MUST STAND

The defendants attempt to undermine the conspiracy conviction on Count I through a backdoor approach. They argue that the evidence does not support the conclusion that a speech by the defendants Winston and Bell on October 5, 1974 is threatening, and that since the speech is mentioned as one of the overt acts in the conspiracy count, the jury "in all likelihood [convicted] the defendants solely on the basis of such speech." (Br. 46)

### A. THE DEFENDANTS VIOLATED COUNT I OF THE INDICTMENT BY SOLICITATING BALLOTS AND UNLAWFULLY DISCHARGING EMPLOYEES

Count I of the Indictment alleges that the conspiracy was carried out by three different means, only one of which involves threatening speech, and sets forth nine overt acts (eight of which were submitted to the jury since overt act number nine was withdrawn on motion of the Government).

Of the overt acts submitted to the jury, six of these allege the firing of eight different pilots. The third overt act alleges that the defendants solicited NMB ballots from their pilots and co-pilots. The defendants cannot complain that unlawful discharges and solicitation are constitutionally protected. See NLRB v. Gissel Packing Co., 395 U.S. 617, 89 S.Ct. 1918 (1969):

> But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coercive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow. 395 U.S. at 616, 89 S.Ct. at 1941.

Paragraph Seven of the conspiracy count alleges:

> The means by which the defendants would carry out this conspiracy include communicating threats of reprisal if their employees should organize, requesting their employees to deliver their National Mediation Board Ballots to the defendants and thereby vote against the organization, and firing and terminating from employment several pilots and co-pilots.

With reference to the means of carrying out the conspiracy, the court instructed as follows:

> The first element is satisfied, therefore, if you find, beyond a reasonable doubt, that any two or more people in any way intentionally combined or agreed to a common plan knowingly and intentionally to interfere with, the protected rights of the employees of the corporate defendants in the manner and means charged in this indictment. (2147)

With reference to the overt acts, the court instructed as follows:

> Now, if you find that any of the overt acts alleged in the indictment was performed by any member of the conspiracy during the existence of the conspiracy, and in furtherance of its purpose, then that one act is sufficient to satisfy the third element, although you see the indictment alleges eight acts, proof of any one is sufficient.
>
> And when I say proof of any one, I do

> not mean -- that the Government has to prove that that overt act was performed by the Defendant whom you are considering. It is enough if the overt act was performed by any member of the conspiracy and done in furtherance of the purposes of the conspiracy. (2153)

There was no exception taken to either of these charges.

In the absence of an appropriate exception, where there is substantial evidence of two of the three specifications of means of carrying out the conspiracy, and seven of the eight overt acts charged in the indictment, the conviction should be affirmed on that basis alone. See United States v. Bonacorsa, 528 F.2d 1218 (2nd Cir. 1976): cert. den. 426 U.S. 935:

> Where there are several specifications of falsity in a single count, proof of any of the specifications is sufficient to support a verdict of guilty ... Indeed, adherence to this rule is virtually mandated if the use of multiple, single-question counts in perjury indictments is to be avoided. Because of appellant's failure to move for the withdrawal of the allegedly ambiguous questions and answers as possible assignments of perjury or in some equivalent manner to focus the attention of the trial court on their asserted infirmities, the error allegedly resulting from their submission has not been preserved for review by this Court. 528 F.2d at 1222.

## B. IN THREATENING THEIR EMPLOYEES WITH RETALIATION IF THEY SHOULD ORGANIZE, THE DEFENDANTS ARE NOT PROTECTED BY THE FIRST AMENDMENT

Even assuming, arguendo, that the Government must prove threats of reprisal in order to sustain the conspiracy count,

the defendants have ignored the more incriminating speech presented to the jury and have attempted to focus the attention of the court on only the recorded comments by the defendants Winston and Bell to the co-pilots made on October 5, 1974. The defendants ignore the substantial portion of unlawful speech proven by the Government of which there can be no reasonable question that it constitutes prohibited threats.

First, the defendants in their brief, appear to have confused the speeches of October 5, 1974. There were, in fact, two meetings that day. The first meeting which the captains attended, and the second meeting which the co-pilots attended. Both defendants, Winston and Bell, spoke at each of these meetings. While it is not disputed that there were similarities in their speeches on that day, there were also important differences. In particular, the defendant Bell had two different versions of his speech. The Government did not contend that he made threats to flunk the co-pilots during the course of his statements to them. The Government did contend, however, that Bell threatened to flunk the captains on their check rides during the course of that speech. Accordingly, the defense argument that co-pilot Hummel and co-pilot MacDougald said nothing of importance other than what was recorded (Br. 55), is not even relevant to the speech in which the Government contends the threats were made.

It should first be noted that a failure of a check ride grounds a captain (386). Paul Briggs, who until November, 1974 (845) was a check pilot for the company along with Bell,

testified that if he conducted the check rides according to the book, he could have failed any pilot (844). Captain Donald Reeve testified that his recourse, if he failed a check ride, would be to demand a check ride from the Federal Aviation inspector (1376) but that he would have to rent, for example, a metroliner "at a pretty high price" (1377).

Of the captains who were present at the meeting on October 5, 1974, William Lamos testified (384):

> [Bell] also stated that in the past, we had been allowed -- some of the procedures had been allowed to slide, and perhaps there had been a little bit of oversight, intentional, when there were errors, but from now on, when he flew with us, things would really be tough.
> Q: Did he say what procedures?
> A: Flying procedures. ...
> Q: Was there an accepted definition in the company of what flying procedures mean?
> A: Yes, check procedures.
> Q: Check procedures, and is that check rides?
> A: Yes, sir.

Captain Jon Solberg testified that at the captains meeting Bell said (751):

> He also talked about the union and he said there is, to the best of my recollection, 'I realize that some of you guys have had bad days and really didn't feel up to it, flying with me, and if the union gets in, this would not longer be tolerated.'

Captain Paul Briggs testified that Bell said (797):

> However, one statement sticks in my mind: he said that, as I remember it, in the past we have overlooked when pilots have had bad days and so forth on check rides, and in the future he would take a closer look at pilots' performance.

The defendant Bell admitted that there were statements not contained in the tape and testified the omitted portion was as follows (1054):

> I said, 'Gentlemen, I fly with you, I fly the same equipment you do, I fly the same routes that you do, the same weather that you do. I don't ask you to fly anything I will not and have not flown myself. I try to stand behind you on the -- I try to appreciate you on your good says and stand behind you on your bad days.

With reference to the above-quoted statement, Bell testified on cross-examination (1231):

> Q: Is it your testimony that that applied to check rides and route checks as well as the other times?
> A: Not necessarily, no, sir.
> Q: Well, what necessarily is your testimony, Mr. Bell?
> A: It was left to their interpretation, really, as far as I am concerned.
> Q: Whatever they could dream up?
> A: That's right.

Captain Donald M. Reeve was a defense witness and recalled the reference to flying (1375) and stated that in the five and one-half years he had been with the company he had flown eleven or twelve check rides with the defendant Bell, five or six official route checks, and on three or four other occasions (1377-78).

There accordingly is more than substantial proof in the record that Bell threatened to fail the captains in their check rides during the course of his speech to the captains on October 5, 1974. This threat was specifically mentioned in overt act number two in Count I of the Indictment.

Evidence of threats by the defendant Winston which are in

the record (exclusive of the speech by Winston on October 5, 1974) included his speech on October 19, 1974, to a group of captains and co-pilots organized for a training session. Co-pilot James Hummel testified "the main substance of the address was to list the company's options, if the ensuing union election were to go against the company." (673). These options were not tied into the signing of a union contract (730). Hummel testified that he took notes at the meeting and recalled Winston stating he had specific options (673-676). These options included that Winston could close the door and sell out the equipment and retire (674). He could slow down, just run to Washington and pull in the less profitable routes (674). If the union came in there would be no fifth metro (675). Defense witness Donald Reeve testified on direct to his recollection of Winston's statements at that meeting (1364):

> My impression is, if the union were to come in, be voted in or if he is going to have to negotiate with the union and it became cost prohibitive for him to operate to the full extent, that he may have to cut back operations, possibly deletions of some of the routes, and if it came to the point when he felt that he could not make a profit or continue in business, that he would stop or cease operations.

There is also evidence that during the course of the individual meetings with the pilots, at which Winston solicited their ballots, Winston made threatening remarks. Co-pilot Paul Sholl testified that Winston mentioned options at a private meeting (359):

> Well, Mr. Winston again reiterated the benefits of the Company versus the union, and

> also told me if the union was voted in that he would either be closing the doors and going to Florida, or else would cut back just to the Washington-Binghamton route, which is the only profitable route, according to him, and cut back to just a couple of flight crews. Also, I was told that there would always be a job for those who were faithful to the Company.

It is clear that these statements made by Winston and Bell were not protected. The trial court extensively instructed the jury in the connection between protected speech and interference, influence, and coercion (2121, line 24- 2124, line 22). The trial court also extensively charged the jury as to the employer's right to make predictions, substantially following the language of United States v. Gissel Packing Company, 395 U.S. 575 at 618, 89 S.Ct. 1918 at 1942 (1969), reh. den., where the Supreme Court rejected a First Amendment claim and stated as follows:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. [citation omitted]. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a

reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." [citation omitted]. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." [citation omitted]. Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable 'economic consequences'," [citation omitted] but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: "[W]hat did the speaker intend and the listener understand?" (A. Cox, Law and the National Labor Policy 44 (1960)), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which

> had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism: and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.

It should be noted that the remedy approved in Gissel, supra, was an extraordinary one whereby the Supreme Court set aside the election, and ordered the company to bargain on request. This relief is distinguished from the ordering of a new representation election in which the "laboratory test" created by the N.L.R.B. is applicable. See Brown and Sachs, The Suppression of Employer Free Speech--A New Ban on "Conscious Overstatements" and a Caveat Against "Brinksmanship", 15 Villanova Law Review, 588 at 597 (1970). The defendants' contention (Br. 40) that the tests for determining whether conduct is objectionable were designed to insure laboratory conditions, is simply inaccurate.

The defendants extract a small portion of the instructions to the jury (Br. 56-57) and assert that the instruction constitutes error. In the passage to which the defendants now (but not at trial) take exception, the court instructed the jury that the defendants may make a prediction provided the prediction was not motivated by an intention to interfere with, influence, or coerce employees because they have exercised, or are exercising, a protected right.

In the first place, almost an identical charge was requested by the defendants in their proposed instruction No. 7 (79e), as follows:

> Subdivisions 3, 4, and 10 of §152 of the Railway Labor Act do not prohibit an employer from making anti-union statements or expressing predictions of dire economic consequences in the event a union is organized at its place of business provided such expressions of opinion do not constitute an intentional interference, influence or coercion of his employees in their choice of representative and in joining, organizing or assisting in the organizing of a labor organization of their choice. [emphasis supplied].

The defendants failed to alert the judge to this particular provision of the charge and, in fact, encouraged such language. Considering that the charge as a whole was fair on this point and that there is no plain error, reversal is not warranted even assuming that the language is improper. Johnson v. United States, supra; United States v. Friedland, supra; United States v. Hynes, supra; Vuckson v. United States, supra.

Furthermore, in the context of the instructions taken as a whole (2122-4), the jury was adequately apprised that motivation alone would not suffice to convict. The objected portion of the instructions is at page 2122 and in discussing the same subject at 2123, the trial court charges that: "The essential question here is, what did the speaker intend, and what did he intend the listener to understand" (2123-4). [Emphasis supplied].

We turn next to the threatening nature of the defendant Winston's remarks to the co-pilots on October 5, 1974, which were recorded and played to the jury.

The defendant argues (Br. 49-50) that Winston's speech on October 5, 1974, was not threatening and points to two portions of the speech referred to by Government counsel during summation. The defendants assert that the prosecutor engaged in improper summation in referring to this speech. However, there was no objection to the summation, and the defendant should not be heard to object at this time. (As previously stated herein, the speech by Winston showed a prior inconsistent statement and the comment in summation was proper). In any event, the speech by Winston was threatening under the test enunciated in Gissel, supra. It should not be forgotten that the meeting was held two days after Slough, Josephson, and Baan had been fired by Winston. The employees whom Winston addressed on October 5, 1974 were aware of the firings [Josephson provided the tape to Ronald Williams, which Williams used to tape record Winston's remarks (316)]. Many of the pilots whom Winston spoke to on October 5, 1974, were present at the initial organizational meeting on October 2, 1974 (100-101). It was apparent that Slough and Josephson were organizers at the October 2, 1974 meeting. They were together with Calder at the commencement of the meeting (100) and Calder mentioned Josephson and Slough to the pilots by name during his talk (209). Michael Baan spoke at the

meeting, on October 2, 1974, giving the impression that Baan felt that they should have a union (105). It was in this context that Winston told the pilots:

> What are the unions going to do? They are going to disrupt our operation. I will be in meetings with them constantly and instead of attending to business, I'm screwing around with unions ... Now let's face it, your jobs are there, if the company survives; if the company is sick, you're out.
>
> Because we will have to cut our lines, lay off pilots, sell off equipment, and that's what they are asking to do to disrupt the organization (453).
>
> ... In 1970, there was a two year depression in the aviation industry and they were laying off pilots like crazy. All over the place and we won't do it, we have as I say, we have prosperity here, no one got laid off, everybody grew, we bought more equipment. I would say the company is pretty progressive. What our policy in the future is going to be again depends upon yourselves (458).

As to whether Winston's spectre of economic consequences was justifiable and can be believed, one need only compare Winston's statement in his speech (459) that "we are paying 13% interest, anybody want to see? ... That means we are paying on just those four [metros] at the rate of, approximately $400,000 a year in interest" to the true facts. [Winston even initially told the trial court that he was paying 13% interest (1409)]. However, on cross-examination Winston admitted that the interest rate was only 7-1/2% on the first two metros,

and while it was 13% on the last two metros, there was a balance due of only $390,000 at the end of 1974 (1846-47). Accordingly, Winston was lying when he told the pilots he had to pay $400,000 per year in interest.

Thus, it would appear clear that even in the recorded speech of October 5, 1974, the defendant Winston threatened his employees within the meaning of Gissel, supra, and that even if there were not the other substantial evidence of threats in the case, the conviction should stand.

The defendants quote several cases (Br. 50-52) in which language by an employer was held not to constitute an unfair labor practice. These cases are all sui generis, and a review of the facts of each case, which will not be undertaken here, will show that their factual situation was entirely different, and that the scope of speech permitted in each case did not violate the requirements established by Gissel, supra.

## POINT IV

### THE SUBSTANTIVE COUNTS CHARGE THE UNLAWFUL DISMISSAL OF AN EMPLOYEE AND THE USE OF THE DEFENDANT'S STATEMENTS TO DETERMINE THEIR INTENT DOES NOT VIOLATE THE FIRST AMENDMENT

It is clear that a jury is entitled to consider surrounding circumstances, even though the surrounding circumstances may be unlawful in themselves, in determining evidence of intent. See United States v. Aluminum Company of America, 44 F.Supp. 97, (S.D. N. Y. 1941) modified other grounds, 148 F.2d 416, where the court stated at 138 as follows:

> In Darius Cole Transportation Co. v. White Star Line, 186 F. 63, at page 65, in 1911, citing numerous Supreme Court decisions, the Circuit Court of Appeals for the Sixth Circuit, within which Alcoa had plants and then did business, summarized the well settled law as follows:
>
> "* * * the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device of control commerce, is not within the federal anti-trust law."
>
> Nevertheless, the circumstances will be considered in connection with all the other facts, for the purpose of arriving at a conclusion as to Alcoa's intent.

The defendants now object to the instructions by the trial court that the jury may consider the surrounding circumstances to determine intent. The language objected to has been specifically approved in United States v. Barash, 365 F.2d 395 (2d Cir. 1966), cert. den. 396 U.S. 832, as follows:

> ... After correctly instructing that the Government must prove 'money was offered or promised or given knowingly and wilfully with a corrupt intent to influence' the employee, and that this may be proved not only by what was said by the accused 'but also from his acts and conduct and the circumstances and reasonable inferences to be drawn from them,' ... (365 F.2d at 402).

In any event, since the defendants did not take exception to the portion of the charge which they now claim is in error, they have waived the issue on appeal. United States v. Friedland, supra.

Defendants argue that there is prejudice from the joinder of two counts, but it is noted that the only two cases cited in support of their proposition (Br. 61) are cases dealing with joinder of defendants, not with joinder of offenses.

No motion for a severance was made below. Since the defendants did not move for a severance, their claim that there was prejudice from joinder of offenses should not be presented on appeal. United States v. Perl, 210 F.2d 457 (2d Cir. 1954) (dealing with joinder of perjury counts). See also, United States v. Russo, 480 F.2d 1228 (6th Cir. 1973) cert. den. 414 U.S. 1157. In any event, even if the cases related to prejudicial joinder of defendants were to apply, the defendants can only succeed in that argument if they show bad faith on the part of the Government in bringing the conspiracy charge or if they show prejudice. United States v. Variano, 2d Cir., Docket No. 76-1335 (decided March 14, 1977) slip opinion at page 2302. The defendants have proven no bad faith, nor have they established that the evidence of speech would be inadmissible to prove intent in the substantive charges.

## POINT V

### 45 U.S.C. 152, THIRD, WHICH PROHIBITS CARRIER INTERFERENCE WITH EMPLOYEES' DESIGNATION OF A REPRESENTATIVE, IS VIOLATED BY RETALIATION AND BY OTHER ACTIVITIES WHICH OCCUR AFTER A REPRESENTATION ELECTION HAS TAKEN PLACE

The defendants in Point V of their brief have made the bald, unsupported assertion that section 2, Third of the Railway Labor Act, 45 U.S.C. 152, Third, cannot be violated by post-election discharges or other post-election activity of a carrier. In light of case law both before and after this section was amended in 1934, this contention is simply incorrect.

In Texas N.O.R.R. Co. v. Brotherhood of Ry. Clerks, 281 U.S. 549 (1930), a majority of the carrier's clerical employees had previously authorized the Brotherhood of Railway Clerks to represent them in matters relating to their employment. This choice was respected by the company until it decided to form its own union. In its efforts, the carrier sought to force withdrawal from the Brotherhood and selection of the company union. Members and representatives of the Brotherhood were subjected to various forms of discrimination and several of the employee representatives were discharged. These actions by the carrier, after the Brotherhood had been selected by a majority of the employees, were found to constitute interference with the liberty of these employees to select a representative in violation of section 2, Third of the Act, 45 U.S.C. 152,

Third, as it then existed.*

In Myers v. Louisiana & A. Ry. Co., 7 F. Supp. 92, 97 (W.D. La. 1933), the court found that actions of the carrier to persuade some of its employees to select another representative in place of the one they had previously chosen, together with promises that they would receive more consideration and better treatment if they selected someone satisfactory to the company, constituted the type of interference proscribed by section 2, Third of the Act, 45 U.S.C. 152, Third. The court further found that the carrier had discriminated in the imposition of harsher disciplinary measures on employees who were members of the union. Some of these employees were discharged for breaches of duty less serious than those of non-union employees who were permitted to retain their jobs. The court enjoined the continuation of such actions in order to preserve the employees' previous selection of their representative in accordance with section 2, Third.

In Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 305 F.2d 605 (5th Cir. 1962), the court determined that a carrier may not destroy or undermine the effectiveness of the employees' chosen representative by discharging him for unfounded, false or baseless charges. If such facts could be proved, a

*/ At the district court level, the court stated that carriers subject to the Act have a continuing duty imposed by section 2, Third, 45 U.S.C. 152, Third, to refrain from interfering with employees' selection of a representative. Brotherhood of Ry. Clerks v. Texas N.O.R.R. Co., 25 F.2d 876, 877 (S.D. Tex. 1928).

violation of section 2, Third, 45 U.S.C. 152, Third, would be established.

Here, a reasonable view of the evidence indicates that the defendant Winston, as representative for the two defendant corporations, attempted to undermine and destroy his pilots' selection of a collective bargaining representative. The facts further indicate that he retaliated against five of them by discharging them for having exercised their right to vote in the National Mediation Board election. These actions severally and collectively, constituted violations of section 2, Third, 45 U.S.C. 152, Third.

On November 25, 1974, the National Mediation Board conducted the representation election in question (68-69). The ballot count indicated that a clear majority of the pilots and copilots had selected Teamsters Local 732 to be their representative. This result was certified by the Board on December 4, 1974. (69-70, Govt. Ex. 14) However, the defendant Winston did not view the election results as having any finality. The day after the election, he began questioning pilots and copilots as to whether they had voted in the election.*/

*/ The defendant Winston was apparently surprised by the ballot count because, prior to the election, he had been able to secure official ballots from fourteen of the pilots and copilots. (1904-1905)

(482) The defendant Bell "accepted" the unvoted ballot of one of the pilots two days after the election and the defendant Winston obtained unvoted duplicate ballots from five of the pilots.*/ (1899-1902, Govt. Ex. 15, App. 19e) The defendants were eventually able to secure statements (which were later personally repudiated) from two of the pilots to the effect that they had not cast ballots in the election.**/ (70, 77, 79-83, 482-483, 752-756, Govt. Ex. 18, 19, 20, 21, App. 25e to 28e). The defendants' efforts culminated in a formal challenge of the election on December 9, 1974, only five days after the Board issued its certification. The challenge was based on alleged "irregularities" which were in fact due to the defendants' own unwarranted interference with the election process and its

*/ Duplicate ballots had been sent to the employees by the Board at their request. These ballots had been requested as replacements for those surrendered to the defendant Winston. (TR. 66, Govt. Ex. 11b)

**/ It is a reasonable inference from the evidence that the pilots gave these false statements to the defendant Winston in order to prevent him from finding out that they had in fact voted in the election, and to protect their jobs. (See TR. 482-483, 752-756)

secrecy.*/ (70, 77, 78, Govt. Ex. 15, 16, 17, 18, App. 19e to 25e).

It is clear from the evidence that the defendant Winston expected to overturn the election and anticipated that a new election would be held. (Govt. Ex. 28, 29, App. 34e and 35e). Given these facts, the post-election discharges of Paul Sholl and William Lamos can be seen as the beginnings of a systematic attempt by Winston to undermine and dilute support for the chosen representative by firing those who supported Local 732, before a second election

*/ The defendant Winston was fully aware that the balloting was supposed to be secret. He specifically mentioned this fact in his October 5, 1974 speech to the pilots. (TR. 472, 1726, 1731-32, 1909) Yet, he purposefully sought to undermine the secrecy of the election by soliciting and obtaining employee ballots in an effort to determine, by process of elimination, just who had voted. This must be viewed in light of Winston's testimony that when an employee gave him his ballot, it meant that he was voting against the union. (TR. 1908) A related purpose for acquiring the ballots was to prevent them from being voted in an attempt to insure votes against the union. Under the Board's election rules, unvoted ballots count as votes against the union. (TR. 67-68) See Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650, 668-671 (1965).

could take place.

Although when viewed in a vacuum, the discharges of Sholl and Lamos may appear justified, it was not unreasonable for the jury to conclude from the totality of the circumstances presented by the evidence that both were singled out for discriminatory treatment not imposed on other employees in similar circumstances. This is underscored by the fact that neither man surrendered his ballot when asked by Winston to do so. Sholl had informed Winston that he had voted his ballot the very day that he got it, and Lamos flatly told Winston that what he did with his ballot was "a personal matter, and no one else's business." (359, 392, 1906) Sholl had also been instrumental in the setting up of one of the union meetings before the election. (356-358) His efforts in this regard had been acknowledged by Alex Calder, the union organizer, at this meeting in the presence of Jon Harrington. (356, 357)

Although ultimately unsuccessful in his challenge of the election (Govt. Ex. 22), these discharges constituted a clear attempt by the defendant Winston to frustrate and undermine his pilots' previous selection of a bargaining representative. For this reason alone, these discharges were in violation of section 2, Third of the Act.

However, more importantly, these two discharges and those three other copilots within a period of a little over two

months after the election, were also in retaliation for these individuals' exercise of their right to vote concerning the selection of a representative. Each man did cast a ballot in the election, and all except Ronald Williams,*/ failed, upon request , to surrender their official ballots to Winston. (532-533, 623-624, 636-637, 679-680) Like Sholl and Lamos, Dennis Larrimore told Winston that he had voted his ballot the day that he received it and further indicated that he preferred not to discuss the way he voted. (623-624) Again, the defendant Winston gave various reasons such as economic setbacks and overstaffing for the discharges. (625-628, 638-643, 681-683) However, none of these men were given any written statement of reasons for their discharges, although Larrimore specifically requested one in his case. (628) Larrimore was told that although his performance had been satisfactory, he would be of less value to the company in the future. (625-628) In the case of Williams, there was also mention of his inability to get his Air Transport Rating**/ and his poor rapport with customers. (534-543) The evidence was in dispute as to whether any of these reasons were true.

*/ Williams did surrender his first ballot to Winston, but at the time he indicated that they (the pilots and copilots) could get duplicate replacement ballots. (TR. 532-533) Williams also told Winston that he was listening to "both sides," management and the union. (TR. 532) His statement concerning the availablity of duplicate ballots was itself an indication to Winston that he had probably been in contact with a representative of the union and had learned of the duplicate ballots from that source.

**/ It is interesting to note in this regard that Larrimore was the only copilot who had gotten his Air Transport Rating. (TR. 620-621)

(See e.g. 535-537, 628-629) In any event, out of twenty-one eligible pilots and copilots, Sholl, Lamos, Larrimore and Hummel were among the only ones who did not surrender a ballot to Winston. (1898-1909) All had given some indication to Winston that they had voted or intended to vote in the election. It was not unreasonable for the jury to conclude from the evidence, that the primary reason for all of these discharges, including that of Williams, was to retaliate against them for being so disloyal to the company as to have voted for the union.*/ These five employees had been singled out for discharge as soon as pretextual reasons could be found to give the discharges some appearance of validity.

As a matter of law, retalization or punishment for the exercise of a right is interference with the free exercise of that right, although it may occur after the fact. In this context, it is clear from the legislative history that such retaliation in any form, is prohibited by the Railway Labor Act. Congressman Crosser, one of the sponsors of the 1934 amendments to this Act,

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*/ It is clear from the evidence that Winston regarded an employee's surrender of his ballot as a vote against the union. (1908) He was well aware of the Board's unvoted ballot rule. See first Footnote p. 78, supra. He made it clear on several occasions that the only way an employee could demonstrate his loyalty to the company was by surrendering his ballot. (481, 616) He even went so far as to tell Paul Briggs that, "I know that there is one way in which you cannot vote for the union . . . If you give me your ballot." (801)

made it clear that a fundamental purpose for the amendments was to guarantee employees freedom to exercise basic rights without fear of consequences. He said:

> The main principle of the bill is also the very essence of democracy itself, in that it gives not only the right but encouragement to men to think and speak in the way they may think to be right on public affairs. The greatest duty we have imposed upon us as American citizens is the duty of preserving the right of freedom of thought, speech, and press, because unless men are free from the fear of consequences incident to their speaking the truth as they see it, then they cease to grow to the stature of true manhood. 73rd Cong., 2nd Sess., 78 Cong. Rec. 12554 (June 18, 1934). (Emphasis added)

Moreover, it should be noted that under the National Labor Relations Act, 29 U.S.C. 151, et seq.,*/ actions taken by an employer, including discharges, to retaliate against or penalize employees for their exercise of protected rights are clearly violative of similar provisions of that statute. N.L.R.B. v. Midtown Service Co., 425 F.2d 665, 670-671 (2nd Cir. 1970); N.L.R.B. v. Milco, Inc. 388 F.2d 133 (2d Cir. 1968); N.L.R.B. v. Dixie Gas, Inc., 323 F.2d 433 (5th Cir. 1963); see N.L.R.B. v. Eastern Massachusetts St. Ry. Co., 235 F.2d 700, 709 (1st

*/ Although cases under the National Labor Relations Act are not controlling precedent under the Railway Labor Act, the courts have recognized their value as a cogent analogy in the analysis of similar issues arising in cases under the Railway Labor Act. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 349 U.S. 369 (1969), rehearing denied, 394 U.S. 1024; Pan American Airways, Inc. v. International Brotherhood of Teamster, 275 F. Supp. 986 (D.C.N.Y. 1967), affirmed 44 F.2d 938; International Association of Machinists v. National Ry. Labor Conference, 310 F. Supp. 905 (D.C. D.C. 1970).

Cir. 1956), cert. denied, 352 U.S. 951.

This fundamental policy or purpose was embodied in the trial court's instructions to the jury in this case. The Court stated:

> Discharge of an employee, if motivated, therefore, wholly or partly by any intention to retaliate against him for the exercise of any of those protected rights, is prohibited.
>
> The Government, therefore, must prove beyond a reasonable doubt that in discharging the employee the defendant was motivated, either wholly or partly by an intention to punish, retaliate, or discriminate against the employee because he was exercising or had exercised protected rights. . . .(2130).
>
> In Short, the Defendant doesn't have to know the law. It simply means that the Defendant must be conscious of what he is doing. In other words, that he is consciously interfering with, influencing or coercing the employee or employees in his or their free choice and free exercise of protected rights, or that he is retaliating against them, or him, for having exercised a protected right. (2137)

This instruction accurately and properly states the law in this regard, and it should be noted that the defendants declined to take any exception to the trial court's instructions. (2156-2157)

There was substantial evidence presented to demonstrate that these post-election discharges were in retaliation for the exercise of the right to vote. Such discharges in retaliation for the exercise of the right to freely designate a representative, constituted the kind of fearful consequences which the Act was meant to remove and prevent. They also served to undermine and frustrate the employees' previous selection of a representative.

Indeed, they were a warning to the remaining employees of what could and would happen to them if the defendants ever got wind of the fact that they exercised a vote in favor of a union at a later time. Hence, it is clear that these post-election discharges were intended to interfere with and did interfere with the employees, particularly the five discharged employees', designation of a representative in violation of section 2, Third and Tenth of the Act, 45 U.S.C. 152, Third and Tenth.*/

*/ As the defendants apparently concede at page 63 of their brief, these discharges also served to prevent Sholl, Lamos, Williams, Larrimore and Hummel from remaining members of their chosen labor organization. The discharges were also in retaliation for their organizing activities, (See e.g. TR. 356-358, 621-622, 757-758, 791-793) all in violation of section 2, Fourth and Tenth of the Act, 45 U.S.C. 152, Fourth and Tenth. In this regard, it should also be noted that these discharges had the threatening effect of coercing the remaining employees, inducing them not to join or remain members of Teamsters Local 732. They too had a right under section 2, Fourth of the Act, 45 U.S.C. 152, Fourth, to be free of such interference, influence and coercion.

## POINT VI

WHETHER COMMUTER AIRLINES, INC. AND BROOME COUNTY AVIATION, INC. ARE SEPARATE ENTITIES IS A FACT QUESTION WHICH MUST BE DETERMINED AT THE TRIAL LEVEL AND NOT RAISED FOR THE FIRST TIME ON APPEAL

The defendants raise for the first time on appeal that the case against Commuter Airlines, Inc., must be dismissed because the evidence makes it clear that as a matter of law there was only one employer, Broome County Aviation, Inc. The defendants refer to Government Exhibits 46 and 47 (44e-74e) which are the financial statements of the two corporations for 1974 and 1975.

The defendants did not raise the issue at trial that the two corporations are separate, and there is independent evidence in the record that Commuter Airlines, Inc., was an employer. In particular, the following captains and co-pilots stated they were employed by Commuter Airlines, Inc.: Robert Slough (89); Ira Josephson (183); Douglas Ton (336); Paul Sholl (355); William Lamos (380); Michael Kleitz (474); Ronald Williams (530); Dennis Larrimore (620); James Hummel (670); Bela Fusztai (1296); Frederick Mayo (1268); Jon Harrington (1279); Arthur Warner, Jr. (1308); Donald Reeve (1361); and Mary Persons (1380).

There is other evidence that Commuter Airlines, Inc. has employees. Government Exhibit 11(b) constituted 24 documents entitled "Rush Request-for-Ballot." On all but one of those documents, the employee stated that he was an employee of "Commuter Airlines" or "Commuter Airlines, Inc.". Government Exhibit No. 3 (App. 6e) is an Application for an Investigation

of a Representation Dispute stating that a dispute has arisen among the employees of Commuter Airlines, Inc. Government **Exhibit 25 (31e),** is a letter to "All flight crews" from T. E. Bell, Chief Pilot, on the letterhead of "Commuter Airlines, Inc." Item 3 on Government Exhibit 25 states that "The following new flight crew members have joined our staff." (emphasis supplied).

It is thus clear that there is ample evidence in the record to support a finding that Commuter Airlines, Inc. had employees. Since the determination that the corporations have employees is a factual matter, it is not appropriately raised on appeal.

The defendants argue that the Government should be estopped from asserting that Broome County Aviation, Inc. and Commuter Airlines, Inc. had separate employer identities. The defendants have the burden of showing they have been misled, however, and have not shown that they sustained any prejudice or changed their position. Ashwander v. TVA, 297 U.S. 288, 323 (1936); Spivak v. United States, 370 F.2d 612, 615 (2d Cir. 1967). See also, Twentieth Century Aircraft v. United States, 351 F.2d 155, 158 (9th Cir. 1965) (Statements in pleading do not entitle opposing party to estoppel).

Even if the National Mediation Board had found that Commuter Airlines did not have employees, the Government would not be estopped in this criminal proceeding. Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 at 162, 43 S.Ct. 47 at 49 (1922). In any event, the NMB did not make any finding that Commuter Airlines, Inc had no employees, but merely designated the carrier as Broome County Aviation, Inc., d/b/a Commuter Airlines, Inc.

## POINT VII

### COUNTS 2 AND 3 AND COUNTS 10 AND 11 ARE NOT MULTIPLICITOUS, NOR WERE THE DEFENDANTS' CONVICTIONS ON THEM IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION

The defendants' final argument in Point VII of their brief, is couched in terms of a violation of the double jeopardy clause of the Constitution. However, there has been no prior trial of any of the defendants on charges related to or similar to those in the present case. Hence, it is clear that this is an attempt to get around the fact that they failed to object at any point before, during or after their trial that Counts 2 and 3 and Counts 10 and 11 of the indictment were allegedly multiplicitous. Such an objection should have been raised long before now, at least at the time of sentencing. Since there is no claim (nor could there be here) of ineffective assistance of counsel, this failure to make an appropriate objection constitutes a complete waiver of any alleged defect in the charges, and precludes the defendants from attacking them for the first time on appeal. United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1958), cert. denied, 355 U.S. 957; United States v. Kelley, 395 F.2d 727 (2d Cir. 1968), cert. denied, 393 U.S. 963; see United States v. Goldberg, 527 F.2d 165, 173 (2d Cir. 1975); Federal Rule of Criminal Procedure 12(b)(2).

In any event, assuming arguendo that the defendants are not precluded from raising the contention that Counts 2, 3, 10 and 11 of the indictment allegedly violated their guarantee against double jeopardy, it must nevertheless fail on the merits.

At the October 2, 1974 meeting between the defendants' pilots and Alex Calder, the representative of Teamsters Local 732, cards were signed by the pilots present authorizing Local 732 to petition the Board in their behalf to conduct a secret representation election, and to represent them in collective bargaining. (102-103, 145-149, 183, 185, 196-198, 209-211, 241-243, 252-253, 261, 264-268, Def. Ex. C) Based upon these signed authorization cards, the union did in fact petition the Board for an election. (Govt. Ex. 3, App.6e). The obvious purpose for this was to prepare the way for a formal designation of Local 732 as the collective bargaining representative of a majority of the defendants' pilots and copilots.*/ This was, therefore, the beginning of the process of designating a representative within the meaning of section 2, Third of the Act, 45 U.S.C. 152, Third, which ultimately culminated in the November 25,

*/ Under the Board's rules, a certain percentage of authorization cards must be submitted before a representation election will be conducted under section 2, Ninth of the Act, 45 U.S.C. 152, Ninth. 29 C.F.R. 1206.2.

1974 election.*/

Those present,**/ particularly Robert Slough and Ira Josephson, were also seeking to organize or assist in organizing the defendants' employees for purposes of choosing a collective bargaining representative. (91-93, 99, 100, 106, 253-254, 260-262) When Slough and Josephson were discharged the day after the meeting, October 3, 1974, they were at that point prevented from carrying through on their designation of a representative. (96-97, 102-103, 233, **Govt. Ex. 10, 11a, App. 14e, 16e**). Slough testified that he never received a ballot and was not able to vote in the election. (168) The evidence indicates that the defendants were aware of the meeting and what went on there,***/ and that the discharges were an intentional interference with Slough's and Josephson's rights to designate a representative in violation of section 2, Third and Tenth of the Act, (See Govt. Ex. 10, **App. 14a**). **See** Brotherhood of R.R. Trainmen v. Southern Ry. Co., 393 F.2d

*/ As Ira Josephson testified, this "was a start to do something." (TR. 209)

**/ This probably does not include Jon Harrington, who was also present at this meeting. (TR. 100, 141-142, 186)

***/ The facts reasonably indicate that Jon Harrington was a spy for the defendants, who had attended the meeting and had reported what had happened there back to the defendants. (TR. 93-99, 100)

303, 307 (5th Cir. 1968). Their discharges also denied them their rights to join, organize and assist in organizing the labor organization of their choice and were also in retaliation for their previous exercise of these rights, all in violation of section 2, Fourth and Tenth of the Act. Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); Lum v. China Airlines Co., Ltd., 413 F. Supp. 613 (D. Hawaii 1976); Griffin v. Piedmont Aviation, Inc., 384 F. Supp. 1070 (N.D. Ga. 1974).

The rights to join, organize, or assist in organizing, and the right to designate a representative are separate and distinct rights under the statute. Moreover, the language of section 2, Tenth of the Act, 45 U.S.C. 152, Tenth, indicates that Congress regarded each enumerated paragraph as setting forth a separate offense. Logically, the rights to organize, assist in organizing and to join a labor organization are separate and distinct from the right to participate in the processes aimed at specifically designating that representative, free of employer interference, influence or coercion. Some recognition of the separate and distinct nature of the rights and duties of section 2, Third, and section 2, Fourth, can be gleaned from discussion concerning these provisions in various cases. In International Ass'n of Machinists v. Street, 367 U.S. 740, 759 (1961), the court stated:

> Congress amended §2, Third to reinforce the prohibitions against interference with the choice of representatives, and to permit the employees to select non-employee representatives. A new §2, Fourth was added guaranteeing employees the right to organize and bargain collectively, and Congress made it the enforceable duty of the carriers "to treat with" the representatives of the employees, §2, Ninth. 367 U.S. at 759.

See Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 542-544 (1937); see Shannahan v. United States, 303 U.S. 596; 601 n. 3 (1938). In Louisville & Nashville R.R. Co. v. Bass, 328 F. Supp. 732, 744 (W.D. Ky. 1971), the court noted:

> Under other provisions of the Railway Labor Act the representatives of the employees must be selected by the majority of the craft or class of employees to be represented (§2 Fourth, 45 U.S.C.A. §152 Fourth); and the employees must be left free to select such representatives without interference from the carrier (§2 Third, 45 U.S.C.A. §152 Third). The National Mediation Board must determine any dispute among the employees as to the identity of their representative and must certify its determination to the employees and to the carrier (§2 Ninth, 45 U.S.C.A. §152 Ninth). 328 F. Supp. at 744.

Here, the same act on the part of the defendants, that is, the discharging of Slough and Josephson, violated both sections 2, Third and Fourth. However, each section created separate rights and imposed separate duties; their elements were not identical. The Government, in charging as it did, was required to prove, and did prove, that, in addition to

violating the organizing rights of the employees under section 2, Fourth, these discharges interfered with the actual process of designating a specific representative which had begun with the signing of union authorization cards.*/ Without proof of this separate element, no violation of section 2, Third of the Act, could have been established.

Since there were separate and distinct elements in section 2, Third and Fourth, requiring proof of facts not common to both, the indictment was not multiplicitous and the defendants' convictions on Counts 2, 3, 10 and 11 did not violate the double jeopardy clause of the Constitution. This is true notwithstanding a substantial overlap in the proof offered to establish the crimes. Blockburger v. United States, 284 U.S. 299, 304 (1932); Gore v. United States, 357 U.S. 386, 390-391 (1958); see Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975); United States v. Cala, 521 F.2d 605, 607 (2d Cir. 1975); see United States v. Ortega-Alvarez, 506 F.2d 455, 457-458 (2d Cir. 1974) (Per Curiam), cert. denied, 421 U.S. 910 (1975).

*/ When we speak in terms of violation of the employees' right, we mean that the discharges not only violated the rights of Slough and Josephson, but also the rights of the rest of the employees to be free of the threatening influence and coercion that these discharges carried, both with respect to their designation of a representative, and their joining, organizing, or assisting in organizing the labor organization of their choice.

## CONCLUSION

The verdict and judgment of the court below should be affirmed.

March 24, 1977.

Respectfully submitted,

PAUL V. FRENCH
United States Attorney
Northern District of New York
Federal Building
Syracuse, New York 13202
(315) 423-5165

ARTHUR A. CHALENSKI, JR.
Assistant United States Attorney

MARK J. VOGEL
Attorney
Department of Justice
Washington, DC 20530

Of Counsel.

# Affidavit of Service

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cc: Paul V. French, Esq.